NO. 83-1209

in the
Supreme Court
of the
United States

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Petitioners,

vs.

BENJAMIN COLE and
MIRIAM COLE, his wife, et al.,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GERALD MAGER
MAURICE GARCIA
Abrams, Anton, Robbins, Resnick,
Schneider & Mager, P.A.
2021 Tyler Street
Hollywood, Florida 33022
(305) 921-5500
and
BRUCE S. ROGOW
3100 S.W. 9th Avenue
Ft. Lauderdale, Florida 33315
(305) 522-2300

Counsel for Petitioner

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THE NEED FOR A CERTIFICATE TO THE FLORIDA SUPREME COURT

The Petition for Writ of Certiorari forthrightly asserted the odd posture of this case. (Petition at 2, n. 1). The Respondent's Brief in Opposition to Certiorari confirms the dilemma faced by Petitioners.

First, Respondents assert that the Florida Supreme Court decision which allowed contractual "as amended" language to act as a waiver of Article 1 §10 rights is not a final judgment. Nevertheless, they contend it "may constitute the law of the case". Brief in Opposition at 3. In the pending United States District Court action, Respondents moved to dismiss, adamantly claiming the disputed issue had been "conclusively determined" in the State litigation. (App. 1).

That adamancy led to the filing of the Petition in this case. Rather than risk being dismissed from District Court with that Court saying certiorari was the proper course, certiorari, or a certificate to the Florida Supreme Court, was sought here.

Having made that choice, Respondents condemn the Petitioners for attempting an "end run" and argue the filing of the District Court suit somehow waives the right to seek certiorari. Brief in Opposition at 4. Then they attack Petitioners for not having raised in the state court on remand from the Florida Supreme Court, the very issue which they maintain has already become the law of the case. *Id.* at 5. Along the same vein, the Respondents maintain that the Petitioners have taken varying positions which constitute "fast

and loose" playing, thereby triggering "judicial estoppel". *Id.* at 6.

The record must be set straight. Petitioners seek only to resolve the question on which Respondent has taken varying positions. Did the Florida Supreme Court finally decide a federal question of the standard for determining waiver of federal constitutional rights? We have doubts, and stated them in the Petition. But the federal jurisdictional problems created by the shifting contentions of the Respondents requires the clarification which may only be provided by the certificate process.

As the discussion below shows, if the Florida Supreme Court did answer the federal question of Article 1 §10 waiver, certiorari should be granted.

I

THE JUDGMENT IS FINAL FOR REVIEW PURPOSES

We agree that the decision of the Florida Supreme Court did not end the state case. Indeed, since the decision merely approved Respondents' pleadings, one could say the state case has just begun. Yet, on the critical issue – Article I, §10 waiver – the Respondents argue that the case has ended by virtue of the Florida Supreme Court decision.[1]

[1]The remaining issues are framed by the Respondents' Sixth Amended Complaint. It raises questions under the recreation lease which are separate from the federal question. Those claims of unconscionability, fraud, unfair and unreasonable covenants running with the land, misrepresentations regarding leasehold improvements and the need to provide certain leasehold

In that circumstance, this case is one of those few which permit the Court to accept jurisdiction "without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting v. Cohn*, 420 U.S. 469, 477 (1975). Since, according to Respondent, the additional proceedings cannot address anew the federal question presented here, the case falls within the *Mills v. Alabama*, 384 U.S. 214 (1966), and *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), categories, as *Cox* described them at 479-80.

(Footnote 1 Continued)

improvements are distinct from the question whether retroactive application of the statutory preclusion of recreation lease escalation clauses was waived.

II

THE DECISION BELOW DOES NOT REST UPON AN ADEQUATE AND INDEPENDENT STATE GROUND

The decision of the Florida Supreme Court did rest upon its application of contract law. Thus we acknowledge the Florida contract law basis for deciding the meaning of a contract provision which agrees to be bound by future law "as amended".

But that is only half the inquiry. The Respondents beg the other half of the inquiry—adequacy—by saying "the Petitioners knew full well they were agreeing to be bound by future legislation." Brief in Opposition at 8. The real question is did the Petitioners' use of the "as amended" language mean they knew full well they were agreeing to be bound by future *unconstitutional* legislation?[2] That is a federal question, not a question of state contract law. "[W]aiver affecting federal rights is a federal question." *Fay v. Noia*, 372 U.S. 391, 439 (1963); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972).

Therefore, the Florida Supreme Court's decision resting on contract law, while an independent ground, was not an adequate ground, for it failed to address the

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[2]There is no dispute that the retroactive application of the statute banning rent escalation would have violated the Contract Clause, were it not deemed "agreed to" by the decision below. (Pet. App. 13).

issue through the federal constitutional prism through which it must be viewed.[3]

If the issue is held up to proper light, the nature and importance of the federal question becomes apparent.

[3]Certainly it cannot be said that the Florida Supreme Court provided a clear and express statement that its decision rested on adequate and independent state grounds. *Michigan v. Long*, ___ U.S. ___, 103 S.Ct. 3469, 3476 (1983). The Respondents urge that conclusion, and although the Court has avowed its distaste for seeking clarification from the state courts, *id.* at 3476, n. 7, the urgency with which the Respondents deny the existence of a federal question here, and claim elsewhere its conclusivity, makes this case a good candidate for clarification in order to avoid unnecessary judicial energy in further lower court proceedings.

III

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT

There can be no disagreement that a statutory provision which precludes a party from enforcing the heart of the contract, in this case, a cost of living escalation clause, impairs the contract. The Florida Supreme Court has agreed with that proposition. *Fleeman v. Case*, 342 So.2d 818 (Fla. 1977).

This Court's early distinction between legislative changes in remedies, and impairment of obligations, draws the distinction well and confirms the impairment accomplished by the Florida Statute. cf. *Bronson v. Kinzie*, 42 U.S. (1 How) 311, 315-16 (1843). *Bronson's* discussion of the right-remedy difference, "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract" *id.* at 316, serves to distinguish *United States Mortgage Co. v. Matthews*, 293 U.S. 232 (1934), the only case offered to glean waiver from "as amended" language. That case involved a remedial change which was not an impairment of an obligation. Thus, it does not support Respondents' assertion that "as amended" language constitutes waiver of contract clause protections.

Indeed, Respondents have cited no case which diminishes the force of our argument that the decision below conflicts with this Court's decisions governing the standard for determining waiver of federal

constitutional rights. *See*, Petition for Certiorari at 7-10.

The Respondents pose several rhetorical questions regarding the nature of a waiver inquiry, and state: "Since the Florida courts have found the [contract] language to be clear and unambiguous, there is no parol evidence which may be taken to clarify same." Brief in Opposition at 10. That approach reflects the Respondents failure to understand that the question is not one of contract law, it is a federal question requiring an inquiry into background facts to determine whether the language was a knowing and intelligent waiver of a fundamental constitutional protection. *D. H. Overmyer Co. v. Frick*, 405 U.S. 174, 185-86 (1972).

Ultimately, the factual question is whether Petitioners knowingly and intelligently agreed to be bound by changes in Florida law which would impair the obligation of their contracts and otherwise be invalid under Article I §10 of the Constitution. That is the heart of this case.

CONCLUSION

If the Florida Supreme Court has answered that federal question affirmatively, certiorari should be granted.

If the Florida Supreme Court decision is unclear as to whether it has answered that federal question, the certificate process should be invoked.

If the Florida Supreme Court has not answered that federal question, and it remains open for litigation, certiorari should be denied.

GERALD MAGER
MAURICE GARCIA
Abrams, Anton, Robbins, Resnick,
Schneider & Mager, P.A.
2021 Tyler Street
Hollywood, Florida 33022
(305) 921-5500
and
BRUCE S. ROGOW
3100 S.W. 9th Avenue
Ft. Lauderdale, Florida 33315
(305) 522-2300

Counsel for Petitioner

BY:_____
BRUCE S. ROGOW

March 1984

Appendix

[RECEIVED DEC-6 1983]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 83-8587 CIV-JCP

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Plaintiffs,

vs.

CONDOMINIUM ASSOCIATION OF
LAKESIDE VILLAGE, INC.,

Defendant.

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Defendant, by and through its undersigned attorneys, hereby moves this Court dismiss the Complaint, on the following grounds:

1. Failure to state a claim upon which relief can be granted, as Plaintiffs are collaterally estopped from re-litigating the very same issues, which have been conclusively determined against them in the state court litigation between the parties.

2. Lack of jurisdiction over the subject matter, as the District Court has no jurisdiction to review, or reverse, state court decisions.

3. Lack of jurisdiction over the subject matter, as no federal question is presented.

4. Failure to state a claim upon which relief can be granted, on the merits, as parties may agree to be bound by future amendments to governing law.

5. As to Plaintiff ANGORA ENTERPRISES, INC., failure to state a claim upon which relief can be granted, for lack of standing.